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In the Supreme Court of the United States

October Term, 1957

No. 1000

MARIAN M. [illegible]

vs.

[illegible]

ON PETITION FOR A WRIT OF CERTIORARI TO THE [illegible]

BRIEF FOR THE [illegible]

[illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 190

MERLIN M. ARMSTRONG, ET AL., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a) is not yet reported.

JURISDICTION

The final judgment of the Court of Claims was entered on January 14, 1959. A timely petition for rehearing was denied on April 8, 1959. The petition for a writ of certiorari was filed on July 7, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, civilian firefighters employed by the Department of the Air

Force are entitled, under the Federal Employees Pay Act of 1945, to compensation for periods of on-call time allowed for eating and sleeping.

STATUTES AND REGULATIONS INVOLVED

The Federal Employees Pay Act of 1945, 59 Stat. 295, as amended, 5 U.S.C. 901, provides in pertinent part:

> SEC. 201. Officers and employees to whom this title applies shall, in addition to their basic compensation, be compensated for all hours of employment, officially ordered or approved, in excess of forty hours in any administrative workweek, at overtime rates * * *. [59 Stat. 296, 5 U.S.C. (1952 ed.) 911.]
>
> SEC. 301. Any officer or employee to whom this title applies who is assigned to a regularly scheduled tour of duty, any part of which, including overtime, falls between the hours of 6 o'clock postmeridian and 6 o'clock antemeridian, shall, for duty between such hours, excluding periods when he is in a leave status, be paid compensation at a rate of 10 per centum in excess of his rate of basic compensation for duty between other hours * * *. [59 Stat. 298, as amended, 5 U.S.C. (1952 ed.) 921.[1]]

The chapter on Pay Administration of Air Force Civilian Personnel Manual 40–1, provides, in pertinent part:

Section 1, par. 12a:

> (3) On-call firefighters and similar types of employees performing on-call duty will be paid for each hour in a duty status in a basic 60-hour weekly tour of duty at two-thirds of the

[1] An amendment in 1954 did not affect the substance of either section. 68 Stat. 1109, 1110, 5 U.S.C. 911, 921.

amount computed at the full basic rate, except when holiday premium pay is applicable. On-call duty outside the regularly scheduled daily or weekly tour of duty hours will be payable at two-thirds of the amount computed at the full basic hourly rate unless the total hours in a pay status exceed 60 hours within an administrative week. When other than on-call duty is performed under the conditions above the full basic hourly rate of pay will be applicable.

(4) Overtime, holiday premium, or night differential pay * * * are not a part of the basic rate of pay. These payments are in addition to basic salary.

* * * * * *

Section 2, par. 10:

10. *Rates of Overtime Pay.*—Generally, the rate of overtime pay is one and one-half times the straight time hourly rate of pay except as modified below:

C. *On-Call Employees.*—The overtime rate for on-call employees is computed on the same basis as for other Classification Act positions, except:

(1) The overtime hourly rate of pay for on-call duty in excess of 60 hours in an administrative week will be two-thirds of the amount computed at the full hourly overtime rate.

(2) The overtime hourly rate of pay will be the full hourly overtime rate of pay for duty in excess of 60 hours in an administrative week when other than on-call duty is performed, for example, when a firefighter is called to duty to assist in actually fighting a fire outside a regularly scheduled tour of duty.

* * * * * *

Section 4, par. 7:

> f. *Rate for On-Call Employees.*—The night differential pay for on-call employees is two-thirds of the amount computed at 10 percent of the full hourly basic rate of pay, for the time for which night differential payment is proper.[2]

STATEMENT

Petitioners, civilian firefighters employed by the Department of the Air Force, filed suit for overtime and night-differential compensation allegedly due them under the Federal Employees Pay Act of 1945, *supra*. Their claim is that they are entitled to such compensation for periods of on-call time allowed for eating and sleeping. The pertinent facts as found by the Court of Claims may be briefly summarized as follows:

Petitioners were employed as firefighters by the Department of the Air Force at Tinker Air Force Base, Oklahoma (F. 2, Pet. App. 9a).[3] Prior to March 1951, they worked two 24-hour and one 12-hour tour of duty per week. Beginning in March 1951, they worked three 24-hour tours per week (F. 7, Pet. App. 12a). Each tour was separated by at least twenty-four hours off duty (F. 15, Pet. App. 19a-20a).

All of the petitioners were compensated for firefighting duties pursuant to the so-called "two-thirds rule" (F. 18, 19, Pet. App. 22a–27a, see p. 3, *supra*). Under this method of compensation, one-third of a tour of duty, although it is time when a firefighter is

[2] Reprinted in Finding 19, Pet. App. 23a. Various language changes have been made in this regulation, but these changes have not altered its substance.

[3] "F" references are to the findings of the Court of Claims.

subject to call and must remain on government premises, is set aside for eating and sleeping and is non-compensable. The remaining two-thirds of the tour is divided equally between active work time and an inactive standby period. Both of these periods are considered to be compensable hours of employment, and they are subject to the application of overtime and night-differential rates.

In the present case, petitioners received pay for forty-eight hours (40 hours at the regular rate and 8 hours at the overtime rate) when on the 72-hour week, and received pay for forty hours when on the 60-hour week. Night-differential pay was credited for two-thirds of the nighttime duty hours (F. 18, Pet. App. 22a–23a). They were permitted to sleep from 8 o'clock p.m. until 7 o'clock a.m. during each tour of duty and were allowed two hours during each twenty-four for eating (F. 14, Pet. App. 18a).

Petitioners were called upon to perform certain duties during their eleven-hour sleeping period (F. 14, Pet. App. 18a), but, as the court found, these duties took up an average total of less than two hours per night (Pet. App. 7a). There remained more than nine hours each night during which petitioners were able to sleep. Thus petitioners had available for sleeping and eating eleven hours out of every twenty-four, only eight of which were uncompensated.

The Court of Claims denied recovery on the ground that firefighters are not "entitled to compensation for time spent in sleeping and eating," so long as they are allowed at least eight hours out of each twenty-four

for such purposes, "merely because such time was subject to possible interruptions." (Pet. App. 4a, 6a).

ARGUMENT

1. In two companion cases, this Court considered whether time spent on an employer's premises by firefighters who are subject to call, but who are not engaged in the performance of actual work, constitutes working time for the purposes of the Fair Labor Standards Act, 52 Stat. 1060, as amended, 29 U.S.C. 201. *Skidmore* v. *Swift & Co.*, 323 U.S. 134; *Armour & Co.* v. *Wantock*, 323 U.S. 126. The Court held that the question cannot be resolved on the basis of any legal formula, but is a question of fact to be resolved by appropriate findings of the trial court in the light of the circumstances of each case. Since the *Armour* and *Skidmore* decisions, the Court has consistently refused to review decisions dealing with the compensability of such time under varying factual situation. E.g., *General Electric Co.* v. *Porter*, 208 F. 2d 805 (C.A. 9), certiorari denied, 347 U.S. 951; *Glenn L. Martin Nebraska Co.* v. *Culkin*, 197 F. 2d 981 (C.A. 8), certiorari denied, 344 U.S. 866; *Bell* v. *Porter*, 159 F. 2d 117 (C.A. 7), certiorari denied, 330 U.S. 813, 817; *Rokey* v. *Day & Zimmermann*, 157 F. 2d 734 (C.A. 8), certiorari denied, 330 U.S. 842; *Wright* v. *United States*, C. Cls. No. 232-57, decided January 14, 1959, certiorari denied, 359 U.S. 1001;[*] *Sawyer* v. *United States*, 138 C. Cls. 152,

[*] The arguments presented to this Court by the Government in *Wright* are fully applicable to this case. For the convenience of the Court, however, we repeat them here.

certiorari denied, 355 U.S. 868; *Conn* v. *United States*, 107 C. Cls. 422, certiorari denied, 332 U.S. 757. In the three cases last cited, this Court declined to review decisions of the Court of Claims with respect to the rights, under applicable pay statutes, of civilian firefighters employed by the Government. The present case is simply another in this series. It does not present any new question of general import and it does not give rise to conflict.

In *Armour & Co.* v. *Wantock, supra*, the district court had held that firefighters employed by a private company were not entitled to compensation for stand-by time normally set aside for eating and sleeping, but were entitled to be paid for the remaining hours on call during which no actual work was performed. Both the court of appeals and this Court affirmed that portion of the judgment which was adverse to the employer; the employees, who had originally contended that all stand-by time was compensable, had taken no appeal. Thus, the precise issue in the present case—whether eating and sleeping time is compensable—was not specifically resolved. The Court pointed out, however (323 U.S. at 133):

> Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer. Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case.

In *Skidmore* v. *Swift & Co., supra*, decided on the same day, this Court reversed a lower court decision

refusing any recovery whatever for on-call time during which no actual work was performed. The Court held that no principle of law precluded a determination that waiting time was working time and that "[w]hether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court. * * * Each case must stand on its own facts." 323 U.S. at 136–37, 140. Again, the question of compensation for relatively long, uninterrupted periods of waiting time set aside for eating and sleeping was not directly in issue. But the Court discussed with approval the manner in which the Administrator of the Wage and Hour Division had resolved the problem administratively. 323 U.S. at 138–39. The Administrator had concluded that a flexible solution was necessary and that in some situations periods of inactivity are not properly counted as working time, *even though the employee is subject to call,* such as portions of a 24-hour tour of duty when the employee "has a normal night's sleep, has ample time in which to eat his meals, and has a certain amount of time for relaxation and entirely private pursuits." 323 U.S. at 138. With respect to firefighters, the Court noted, as "entitled to respect" (p. 140), the conclusion of the Administrator, expressed in his brief *amicus curiae* in that case, that the appropriate standard called for "the exclusion of sleeping and eating time of these employees from the workweek and the inclusion of all other on-call time: although the employees were required to remain on the premises during the entire time, the evidence shows that they were very rarely

interrupted in their normal sleeping and eating time, and these are pursuits of a purely private nature which would presumably occupy the employees' time whether they were on duty or not and which apparently could be pursued adequately and comfortably in the required circumstances * * *" (p. 139).[5]

The Court of Claims correctly applied these principles in holding that petitioners were fully compensated by being paid both for the time actually worked and for the inactive period of standby duty, and that they are not entitled to additional compensation for time spent in eating and sleeping, even though they were subject to call during those periods. Petitioners were permitted to sleep from 8 o'clock p.m. until 7 o'clock a.m. during each 24-hour shift and were allowed two hours of each 24 for meals. Interruptions during these periods averaged no more than two hours in each tour of duty. Since at least

[5] This is also the understanding which the Senate Committee on Post Office and Civil Service has of the Federal Employees Pay Act. In recommending a proposed amendment to that Act, the Committee said:

"The equity of the bill lies in the fact that under its terms each fire fighter or other 'long-tour standby' employee would be paid for unscheduled and irregular overtime beyond his established tour on exactly the same basis as other Federal employees. In that respect the committee desires to make clear that overtime would not be paid for time allowed for eating and sleeping during overtime assignments. This is consistent with the provisions of the Federal Employees Pay Act under which standby employees paid under the regular hourly premium pay provisions are not paid for uninterrupted periods allowed for sleeping and eating and the Fair Labor Standards Act which does not require that standby employees in industry be paid for such periods."

S. Rep. No. 687, 85th Cong., 1st Sess., p. 2.

eleven hours remained for eating and sleeping, petitioners were fully compensated for the interruptions and now claim compensation only for time spent eating and sleeping during regular, lengthy periods allowed for such purposes. A recovery of this kind would be novel and contrary to the consistent practice under both the Fair Labor Standards Act and the applicable federal pay statutes.

2. Petitioners contend (Pet. 15–17) that the decision below is in conflict with certain appellate decisions under the Fair Labor Standards Act. However, the alleged conflicts merely reflect the differing factual situations involved in those cases.

In *Central Missouri Tel. Co.* v. *Conwell*, 170 F. 2d 641 (C.A. 8), the court held that an employer could not deduct three hours as sleeping time from an 11-hour shift of night telephone operators. The decision was based on the fact that the operators could rest only as duties permitted, constantly had to attend to the switchboard and other work matters during the entire tour, and on many nights were disturbed at frequent intervals. Thus, the operators were not only in readiness but rendered considerable service for which they had received no compensation.

Similarly, in *F. W. Stock & Sons, Inc.* v. *Thompson*, 194 F. 2d 493, the Sixth Circuit held that mechanics' and engineers' "lunch periods" were compensable since the time was spent predominantly for the employer's benefit watching and caring for machinery—"A man who has to oil machinery with a sandwich in his hand is not having a free lunch period." 194 F. 2d at 496.

In *General Electric Co.* v. *Porter*, 208 F. 2d 805, certiorari denied, 347 U.S. 951, the Ninth Circuit, noting that whether or not sleeping time of firefighters is compensable depends upon the circumstances, took into account that the firefighters had to protect not only the employer's plant area but two populous communities as well, thus greatly increasing the probability of an alarm at night.

In *Glenn L. Martin Nebraska Co.* v. *Culkin*, 197 F. 2d 981, the Eighth Circuit affirmed a district court's finding that an employer was required to compensate his employees for their lunch period when, because of duties that they were assigned during this period, their time was not their own but belonged to the company. 97 F. Supp. 661, 669–70 (D. Neb.).

None of these holdings is inconsistent with the case at bar. Each turns on its own facts.

3. Petitioners also contend (Pet. 18–22) that the decision of the Court of Claims in this case is inconsistent with other decisions of that court. But the Court of Claims has consistently followed the rule that, under the Federal Employees Pay Act of 1945, *supra*, an employee is not to be compensated for time reserved for sleeping and eating merely because such time was subject to possible interruptions, but is to be compensated for any substantial periods within that reserved time in which he actually performs labor for the Government. In short, the Court of Claims has adhered to the principles elucidated by this Court in *Armour* and *Skidmore*, *supra*. See *Farley* v. *United States*, 131 C. Cls. 776; *England* v. *United States*, 133 C. Cls. 768; *Gaetke* v. *United States*, 136

C. Cls. 756, 145 F. Supp. 913; *Sawyer* v. *United States*, 138 C. Cls. 152, certiorari denied, 355 U.S. 868; *Collins* v. *United States*, C. Cls. No. 141–56, decided March 5, 1958; *Avary* v. *United States*, C. Cls. No. 266–56, decided March 5, 1958; *Ahearn* v. *United States*, C. Cls. No. 332–55, decided May 7, 1958; *Wright* v. *United States*, C. Cls. No. 232–57, decided January 14, 1959, certiorari denied, 359 U.S. 1001. The present case is but another instance in which the court below has undertaken to apply the settled rule of law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1959.

U.S. GOVERNMENT PRINTING OFFICE: 1959